STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

LOUIS GHAFFARI,
Plaintiff/Appellant,

-vs-

Supreme Court Nos. 124786, 124787
Court of Appeals Nos. 241532, 240025
Wayne Circuit No. 00-07319-NO

TURNER CONSTRUCTION COMPANY,
a Michigan Corporation,
HOYT, BRUM & LINK, a Michigan Corporation,
and GUIDELINE MECHANICAL, INC.,
a Michigan Corporation,
Defendants/Appellees,

DEFENDANT-APPELLEE HOYT BRUM & LINK'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES

Cases **Page**

Statutes

Rules

STATEMENT OF THE ORDER FROM WHICH APPELLANT TAKES THIS APPEAL

Plaintiff-Appellant appeals from a published opinion of the Michigan Court of Appeals dated September 25, 2003.

STATEMENT OF JURISDICTION

This matter is properly before the Court pursuant to MCR 7.301, MICH. CONST. Art. 6, § 4, and MCL § 600.215.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT PROPERLY APPLY THE OPEN AND OBVIOUS DOCTRINE IN GRANTING SUMMARY DISPOSITION TO ALL DEFENDANTS?

The trial court said YES.
Appellee says YES.
Appellant says NO.
The Court of Appeals said YES.

II. SHOULD THE OPEN AND OBVIOUS DOCTRINE APPLY TO A CLAIM OF CONSTRUCTION WORK INJURY IN LIGHT OF THE COMMON WORK AREA TEST STATED IN THIS COURT'S DECISION IN *ORMSBY V. CAPITAL WELDING*, 471 MICH. 45; 684 NW2D 320 (2004)?

The trial court did not address *Ormsby* as the decision had not been issued at the time of the lower court's ruling.
Appellee says YES.
Appellant says NO.
The Court of Appeals did not address *Ormsby* as the decision had not been issued at the time of the lower court's ruling.

III. DOES THE OPEN AND OBVIOUS DOCTRINE CONFLICT WITH THIS COURT'S HOLDING IN *HARDY V. MONSANTO ENVIRON-CHEM SYSTEMS, INC.*, 414 MICH. 29; 323 NW2D 270 (1982)?

The trial court did not address this issue..
Appellee says NO.
Appellant says YES.
The Court of Appeals did not address this issue, but implicitly said NO.

IV. DID THE TRIAL COURT PROPERLY GRANT SUMMARY DISPOSITION TO HOYT, BRUM & LINK?

The trial court said YES.
Appellee says YES.
Appellant says NO.
The Court of Appeals said YES.

V. DID THE TRIAL COURT APPROPRIATELY APPLY THE OPEN AND OBVIOUS DOCTRINE TO THE PIPES ON WHICH APPELLANT SLIPPED AND FELL IN GRANTING SUMMARY DISPOSITION TO DEFENDANT HOYT?

The trial court said YES.
Appellee says YES.
Appellant says NO.
The Court of Appeals said YES.

VI. WAS THE TRIAL COURT'S DISMISSAL OF HOYT, BRUM & LINK SUPPORTED BY THE GENERAL RULE THAT A SUBCONTRACTOR HAS NO DUTY TO PROTECT EMPLOYEES OF OTHER CONTRACTORS?

The trial court did not reach this issue.
Appellee says YES.
Appellant says NO.
The Court of Appeals said YES.

VII. WAS THE TRIAL COURT'S DISMISSAL OF HOYT, BRUM & LINK SUPPORTED BY THE LACK OF EVIDENCE LINKING IT TO THE PIPES, *I.E.,* LACK OF CAUSATION?

The trial court did not reach this issue.
Appellee says YES.
Appellant says NO.
The Court of Appeals did not reach this issue.

VIII. WERE CASE EVALUTION SANCTIONS PROPERLY AWARDED UNDER MCR 2.403(O) AS A SANCTION FOR APPELLANT'S REJECTION OF THE CASE EVALUATION WHEN THE CASE UPON WHICH THE TRIAL COURT RELIED IN GRANTING SUMMARY DISPOSITION WAS DECIDED AFTER THE CASE EVALUATION HEARING AND WHILE APPELLANT'S COUNSEL WAS ON VACATION?

The trial court said YES.
Appellee says YES.
Appellant says NO.
The Court of Appeals said YES

I. INTRODUCTION

This case involves the application of the open and obvious doctrine to the liability of contractors on a job site. The Complaint arises out of a slip and fall incident where Plaintiff-Appellant Louis Ghaffari ("Plaintiff" or "Appellant") fell over large pipes located in a storage area on a construction site. Appellant sued the general contractor, Defendant-Appellee Turner Construction Company ("Turner"), and the subcontractors, Defendants-Appellees Hoyt, Brum & Link ("Hoyt") and Guideline Mechanical, Inc. ("Guideline"), alleging that each was responsible for the allegedly hazardous condition on the premises. The trial court granted summary disposition to all defendants based on the open and obvious nature of the pipes, which were allegedly laying on the floor of a storage room at the site. The Michigan Court of Appeals affirmed the trial court's decision in an opinion dated September 25, 2003.

Appellant challenges the trial and appellate courts' application of the open and obvious doctrine to his cause of action. Appellant claims that the open and obvious doctrine should not bar recovery in construction accident cases and that the doctrine applies only in cases of premises liability. Appellant also contends that MIOSHA and OSHA impose a specific "duty" that all defendants must meet. The Court of Appeals disagreed and held that the safety statutes imposed no duty upon employers, although MIOSHA and OSHA may provide evidence of negligence. *Ghaffari v. Turner*, 259 Mich App 608, 613; 676 NW2d 259, 263 (2003).

The Michigan Court of Appeals further provided two additional bases for its holding. These alternate holdings provide a sound basis for the appellate court's decision even if it did err as to the open and obvious doctrine. Indeed, the Michigan Court of Appeals alternately found that Defendants, as a matter of law, owed Appellant no duty to ensure the safety of the work site. *Ghaffari*, 259 Mich App at 615; 676 NW2d at 263. Further, the appellate court addressed all of the factors listed in *Funk v. General Motors*, 392 Mich 91; 220 NW2d 641 (1974), that apply to

general contractor liability. *Id.* at 615-16; 676 NW2d at 264-65. Even using those factors, the appellate court found no liability. Consequently, these alternate bases further support dismissal of all claims against Hoyt.

The appellate decision was well-reasoned and in accord with relevant Michigan law. Defendant-Appellee Hoyt requests that this court AFFIRM the decision of the Michigan Court of Appeals.

II. COUNTER-STATEMENT OF FACTS

A. THE BUILDING OF THE IMAX THEATER

This case arises from Appellant's alleged slip and fall accident at the IMAX Theater construction site in Dearborn on August 2, 1999. Former defendant/third-party plaintiff, The Edison Institute ("Edison"), owned the construction site located at the Henry Ford Museum. Turner was the general contractor and construction manager at the IMAX site. (*See* Ex. B to Turner's Motion for Summary Disposition; Hoyt's Appx. 14b-94b). Defendants Hoyt and Guideline were subcontractors at the site. Hoyt did certain pipefitting work; Guideline did plumbing and other work at the site. Appellant's employer, Conti Electric, Inc. ("Conti"), performed certain electrical work. (*See* Ex. A to Turner's Motion for Summary Disposition; Hoyt's Appx. 30b-47b).

B. APPELLANT'S KNOWLEDGE OF ORDINARY DANGERS FACING CONSTRUCTION WORKERS ON THE JOB SITE

At the time of the accident, 51-year-old Appellant Louis Ghaffari was an experienced electrician who had worked in the field for approximately twelve years. As an industrial and commercial electrician, Appellant worked primarily at large job sites, such as shopping malls, movie theaters, and manufacturing facilities. (*See* Ex. 1 to Hoyt's Motion for Summary Disposition, Pl. Dep. at 6-7; Hoyt's Appx. 236b). Thus, at the time of his accident, Appellant was intimately familiar with the hazards of a busy, large-scale construction site. Appellant

conceded that a normal construction site, including the IMAX project, necessarily contains many dangers of which a worker must be aware. He testified:

> Q All right. And you've been working on commercial construction sites for how long?
> A 12 years.
> Q And in those 12 years you certainly were aware that you had to keep your eyes open for any unmarked trip hazards, correct?
> A That's correct.
> Q Okay. And I think you've already told me, regarding this particular project, there were a number of trip hazards?
> A That's correct.

(*See* Ex. 1 to Hoyt's Motion for Summary Disposition, Pl. Dep. at 47-49; Hoyt's Appx. 245b-246b).

As a natural result of the existence of these ordinary hazards on a job site, Appellant knew and understood that he had to take extra precautions to prevent injury. He explained:

> Q Was there anything obstructing your point of view [of the pipes on which you fell?]
>
> * * *
>
> [PLAINTIFF]: No. There was a lot of work going on, a lot of noise being made, you know. I not only had to watch for obstructions of, you know, floors, but I had to watch for how - - construction site's a very dangerous thing, you know, things, you know, could be falling, pipes moving, you know, all that stuff is in my mind.

(*See* Ex. 1 to Hoyt's Motion for Summ. Disp., Pl. Dep. at 47; Hoyt's Appx. 245b) (emphasis added).

Not only was Appellant aware of the ordinary dangers of a work scene, he was actually charged with the responsibility for the safety of Conti employees. As a working foreman, at least one of Appellant's responsibilities was to oversee the safety of other Conti employees at the site. (*See* Ex. 1 to Hoyt's Motion for Summary Disposition, Pl. Dep. at 8-12; Hoyt's Appx. 236b-237b). In this capacity, Appellant learned of many trip hazards on the construction site at IMAX:

> There were . . . other safety hazards, you know, constantly extension cords were draped over, you know, the stairwells, you know, the steps leading to - - you know, the first elevation to the second and second to the third and so on.

* * *

> There was material laying around, you know, all over the place. The place where we were told to store our material gang boxes and our tool gang boxes, there was probably a sprinkler pipe laying, you know, on the floor in between the all the stuff, you know. Very sloppy and hazardous situation.

(*See* Ex. 1 to Hoyt's Motion for Summary Disposition, Pl. Dep. at 5, 14-15; Hoyt's Appx 236b, 238b).

C. THE SCENE OF THE INCIDENT

On August 2, 1999, Appellant allegedly was injured on the job site when he was not paying attention to where he was walking and he slipped on pipes that were laying on the ground in plain sight. Several photographs, taken near the time of Appellant's fall, depict the incident area. (*See* Ex. 2 to Hoyt's Motion for Summary Disposition, Photographs; Hoyt's Appx. 254b).[1]

A close review of the photographs reveals the accident scene. In the background, an opening appears and, behind that opening, a storage area existed where some of the subcontractors at the construction site kept their gang boxes and tools. This storage area is part of the museum building that existed prior to the IMAX theater construction. In effect, the IMAX theater was "grafted" onto the older museum structure. The area in the foreground of the photographs is the area of the new theater structure that eventually became the lobby of the IMAX theater. The opening that appears in the photographs, or the "passageway" or "corridor" (which are the words Appellant and his attorney insist upon using when referring to an unmarked hole in the wall) was formerly a large, arched window in the existing museum building. (*See* Ex. 3 to Hoyt's Motion for Summ. Disp., Dep. of Richard Wanserski at 8-13; Hoyt's Appx. 256b-261b).

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[1] Appellant acknowledged that the photographs show the position of the pipes and the condition of the area at the time of his accident. *See* Exhibit 1 to Hoyt's Motion for Summary Disposition, Pl. Dep. at 38-40 and Exhibit 2 to Hoyt's Motion for Summary Disposition, Photographs. The photographs were reproduced in color and are attached to Appellant's Appellate Brief to the Court of Appeals.

Prior to Appellant's fall, a plywood board had been used to cover the opening between the old and new structures. Workers at the construction site sometimes walked through a hole created by the removal of another one of the former arched windows that was positioned on the same wall as the hole depicted in photographs. (*See* Ex. 3 to Hoyt's Motion for Summary Disposition, Dep. of Richard Wanserski at 12-14; Hoyt's Appx. 260b-262b). Some time before Appellant's accident, employees of Acoustical Ceiling & Partition Company, a former defendant in this action, removed the plywood from the hole shown in the photographs. Although Appellant was not certain when the plywood had been removed, he believed it had been removed the morning of his fall or the previous night. (*See* Ex. 1 to Hoyt's Motion for Summary Disposition, Pl. Dep. at 18-20; Hoyt's Appx. 239b).

The photos depict the large copper colored pipes that were allegedly involved in the accident. (Ex. 2 to Hoyt's Motion for Summary Disposition; Hoyt's Appx. 254b). The pipes that are shown in the photographs have been identified variously as copper plumbing pipes, copper heating and cooling pipes, sprinkler pipes, and/or steel pipes.

D. THE INCIDENT

On August 2, 1999, Appellant fell on various pipes on the job site at the IMAX project. Appellant testified that this was the first time that he used the hole shown in the photographs to walk from the old museum building into the new theater structure. Although Appellant believed the IMAX construction site to be especially dangerous, Appellant fell when he walked through the new hole blindly and into an area with which he claims he was largely unfamiliar. Appellant did so without looking on the ground in front of him because, in words that starkly contrast with his own statements regarding the safety of the job site, **he "didn't expect to see anything on the floor."** (*See* Ex. 1 to Hoyt's Motion for Summ. Disp., Pl. Dep. at 38; Hoyt's Appx. 243b)

(emphasis added). Appellant's heedlessness placed him squarely upon the copper pipes that were located in plain view. Appellant explained the incident:

> Q How did you fall?
> A I was walking out of the store. After talking with Rich, I walked through the corridor, and I come through and - - that being the first time I ever walked through, you know, I didn't expect to see anything on the floor, and once I walked through, my foot landed on the pipe, and it was too late, and that's when I realized that there were pipes on the ground. And the pipes rolled and I went flying through the air and landed on my back with my arm extended, and I was knocked silly for a while, you know. I was kind of incapacitated for probably five minutes or so.

(*See* Ex. 1 to Hoyt's Motion for Summary Disposition, Pl. Dep. at 38; Hoyt's Appx. 243b).

Despite his knowledge of the dangers presented by an ordinary construction site, Appellant failed to heed his own cautions despite the fact that he had "probably" seen pipes on the floor in this area previously. He testified:

> Q On the days that you have been through this area before your fall, did you ever see pipe stored there?
> A I seen pipes on scaffolding, on pipe racks.
> Q You never saw anything on the floor? Any pipes.
> A There were probably pipes stored on the floor that shouldn't have been there, you know.

(*See* Ex. 1 to Hoyt's Motion for Summ. Disp., Pl. Dep. at 97-102; Hoyt's Appx. 248b-249b).

Although the pipes appear in plain view in the photographs, Appellant maintained that he was unable to see them until it was too late. He could not offer an explanation as to why he could not see the pipes, other than that he did not expect to see them there. He testified:

> Q Okay. Can you give us any explanation why you didn't see the pipe?
> A I seen it when it was too late.
> Q All right. If I'm not mistaken, you testified earlier in your deposition that you didn't see it prior to your fall. But then you testified later, at the direction of your attorney, that you said in your answers to interrogatories that you saw it just before you stepped on it. Which one is it that's accurate?
> A I'm not - - all I know is that when I was walking through I didn't see it until my foot was on it.
>
> * * *
>
> Q You were looking straight ahead, weren't you?

A That's correct.

* * *

Q You can't say one way or another if anything obstructed your vision?
A I can't recall.

* * *

Q Why couldn't you see whether there was an obstruction in your way?
A I can't tell you that. You know.
Q Okay.
A It happened. If I would have seen it, I wouldn't have tripped over it.
Q How do you know?
A How do I know?
Q Yeah.
A I would have avoided it.
Q And I want to know why you didn't see it.
A I can't tell you.
Q Can't you give me an explanation?
A I can't give you an answer.
Q Okay. Are you saying there wasn't enough light in that room to see it?
A I'm not saying anything like that.
Q So you just have absolutely no excuse for not seeing it?
A I didn't expect it to be on the floor in front of the doorway.

(*See* Ex. 1 to Hoyt's Motion for Summary Disposition, Pl. Dep. at 97-102; Hoyt's Appx. 248b-249b).

Notwithstanding this testimony, however, Appellant admitted that he had a clear view of the pipes prior to the fall and that, had he seen the pipes prior to the incident, he could have easily avoided them. He admitted:

Q In the two, three steps that you took after you cleared the wall, there was nothing that obstructed your view of the pipe, is that accurate?
A That's probably accurate.

* * *

Q In walking through here, had you seen what you saw only at the time that you stepped on it?
A Uh-huh.
Q The pipes, in other words, you could have easily walked around them or stepped over them, right?
A If I would have seen them.
Q Sure. I mean, had you known they were there, had you stopped and seen them before you walked through the area, you could have walked around them, you could have stepped over them without danger to you, correct?
A That's correct.

(*See* Ex. 1 to Hoyt's Motion for Summary Disposition, Pl. Dep. at 134, 144-45; Hoyt's Appx. 250b, 251b-252b).

Brian Muir, an employee of Guideline Mechanical, corroborated Appellant's testimony that the pipes were an open and obvious danger that he would have seen had he only been looking. Mr. Muir testified:

> Q Now you also testified that you worked on the second floor [in an area above the place where plaintiff allegedly fell]?
> A Yes.
> Q When you peered down from the second floor after the accident, did you see the pipes from where you were, from where you were standing?
> A Yes, I could see the pipe.
> Q So you could see the pipe from the second floor?
> A Yes.
> Q All right. And you saw the pipe before Mr. Ghaffari's accident?
> A I saw the pipe in that area before that, yes. I knew it was there.
> Q Okay. So was the area lit in such a way that you could see pipe on the ground?
> A Yes.
> Q So it wasn't difficult for you to see the pipe?
> A No, it wasn't.

(*See* Ex. 4 to Hoyt's Motion for Summ. Disp., Dep. of Brian Muir at 42-43; Hoyt's Appx. 268b).

After the accident, Appellant gave an interesting account of his accident to Mr. Muir. In essence, Appellant explained to Mr. Muir that he approached the pipes with his backside first! Mr. Muir testified:

> A Well, [Appellant] Mr. Ghaffari, when we had talked, it was at a later date, I believe a week later . . . . And I had asked him what had happened. He told me he had climbed up on the end of the scaffolding to look at something up in the steel, and I can't remember if he told me one of his guys was on a ladder, whatever. When he stepped back down, he stepped onto the pipe, fell backwards and hurt himself.

(*See* Ex. 4 to Hoyt's Motion for Summ. Disp., Dep. of Brian Muir at 22; Hoyt's Appx. 267b).

E. THE OWNERSHIP OF THE PIPES

Throughout this case, Appellant maintained that pipes involved in the accident belonged to either Hoyt or Guideline. Although witnesses have inconsistently identified the *types* of pipes, their testimony has been consistent in two crucial aspects: (1) Not a single witness has been able

to positively identify the owner of the pipes; and (2) not a single witness knows exactly who placed the pipes on the ground.

David Kunath, a pipe fitter who worked for Hoyt, testified that the pipes shown in the photographs did not belong to Hoyt because Hoyt stored its pipes off the floor on a wheeled scaffold that was kept approximately ten feet away from where Appellant allegedly fell. (*See* Ex. 5 to Hoyt's Motion for Summ. Disp., Dep. of David Kunath at 22-25, 31-32; Hoyt's Appx. 274b-277b, 278b-279b). As a practice, Hoyt stored its pipes on the scaffold because, as Kunath explained, the IMAX project was "a very mobile job" and it was easier to move Hoyt's pipes where they were needed if they were kept in one place on the movable scaffold. (*See* Ex. 5 to Hoyt's Motion for Summ. Disp., Dep. of David Kunath at 24-25; Hoyt's Appx. 276b-277b). Neither Hoyt's toolboxes nor its other equipment are pictured in the photographs of the scene of Appellant's alleged fall. (*See* Ex. 5 to Hoyt's Motion for Summ. Disp., Dep. of David Kunath at 54-59; Hoyt's Appx. 282b-287b).[2]

Brian Muir, a Guideline employee, testified that he and other Guideline employees used the kind of copper pipe shown in the photographs on which Appellant allegedly slipped and fell. (*See* Ex. 4 to Hoyt's Motion for Summ. Disp., Dep. of Brian Muir at 10; Hoyt's Appx. 264b). Mr. Muir testified that the copper pipes shown in the photographs on the floor were not labeled with the name of the subcontractor to whom they belonged, so it was impossible to tell to whom they belonged. (*See* Ex. 4 to Hoyt's Motion for Summ. Disp., Dep. of Brian Muir at 9-12; Hoyt's Appx. 264b). However, Mr. Muir acknowledged that, unlike Hoyt, Guideline kept its gangbox in the area shown in the photographs and stored its copper pipes on a **stationary scaffold** that was

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[2] Kunath testified that Guideline's gangbox is depicted in the photographs of the scene of the alleged fall, which establishes that it was Guideline, not Hoyt, that kept its tools and materials in the area depicted in the photographs. (*See* Exhibit 5 to Hoyt's Motion for Summary Disposition, Kunath Deposition at 20-22). Kunath testified that, unlike Hoyt, Guideline most likely did not use a mobile scaffold to store its copper pipes.

permanently located **outside** the IMAX theater building. (*See* Ex. 4 to Hoyt's Motion for Summ. Disp., Dep. of Brian Muir at 12-13, 20; Hoyt's Appx. 264b-265b; 266b).

Other testimony establishes that the pipes belonged to **Guideline**. For example, Mike Wanserski, an Acoustical Ceiling & Partition employee who worked at the IMAX construction site, testified that the copper pipes shown in the photographs belonged to **Guideline**, not Hoyt. (*See* Ex. 6 to Hoyt's Motion for Summ. Disp., Dep. of Mike Wanserski at 14-15; Hoyt's Appx. 289b).

F. THE TRIAL COURT'S DECISION

After the close of discovery, Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant Turner argued that it could not be held liable because the alleged danger was open and obvious. Turner also argued that Appellant could not establish the requisite elements under Michigan law to hold it liable as the general contractor. (*See* Turner's Motion for Summ. Disp.; Hoyt's Appx. 14b). Defendants Hoyt and Guideline joined Turner's argument regarding the open and obvious danger doctrine. (*See* Hoyt's Concurrence in Turner's Motion for Summ. Disp.; Hoyt's Appx. 14b). Both defendants argued that the doctrine should apply to Appellant's claims against them as subcontractors. (*See* Hoyt's Motion for Summ. Disp.; Hoyt's Appx. 215b). In addition, both defendants argued that Appellant could not establish that either defendant owned or had control of the pipes at issue. (*See* Hoyt's Motion for Summ. Disp.; Hoyt's Appx. 215b).

Appellant argued that the doctrine should not apply to this case because the open and obvious doctrine applied only to claims against a possessor or owner of land. Appellant further argued that applying the doctrine was inconsistent with the principles of MIOSHA. Finally, Appellant submitted an unsworn letter of a witness who did not appear on his witness list, Dr. Robert G. Pachella, a psychologist, who submitted that the danger was not open and obvious, but

particularly dangerous because the pipes were at or near foot level. (*See* Ex. 3 to Appellant's Supplemental Brief in Opposing Motions for Summary Disposition, Pachella Affidavit, claiming that the pipes posed an unreasonable risk because they were located "where one expects a relatively uniform surface at foot level").[3]

The trial court held a lengthy oral argument on November 11, 2001. During that argument, the trial court granted Defendants' motions for summary disposition. (Tr. 11/11/01 at 64; Hoyt's Appx. 368b). Specifically, the trial court found that the accident did not occur in a common work area and that the danger was open and obvious. (Tr. 11/11/01 at 13, 64; Hoyt's Appx. 317b, 368b). The Court also held that there was no extraordinary danger presented in this case that made the danger so great that an injury was likely even if the danger was observable. (Tr. 11/11/01 at 13, 64; Hoyt's Appx. 317b; 368b). The trial court rejected Appellant's arguments that (i) the open and obvious doctrine did not apply in the construction settings, (ii) an independent duty arose under MIOSHA, and (iii) MIOSHA precluded application of the open and obvious doctrine. (Tr. 11/11/01 at 63; Hoyt's Appx. 367b). The court also rejected Appellant's expert's suggestion that an unreasonably dangerous condition existed simply because it was located at foot level. The trial court noted that the location of an obstacle at foot level a few feet around a corner did not transform the alleged danger into a dangerous condition. (Tr. 11/11/01 at 71-72; Hoyt's Appx. 375b-376b).

The trial court also found that Appellant's claim that the pipes belonged to Guideline was speculative. (Tr. 11/11/01 at 31, 64; Hoyt's Appx. 335b; 368b). However, because it had already granted summary disposition to Hoyt, the trial court did not rule on Hoyt's argument that Appellant lacked sufficient proof linking it to the pipes at issue. (Tr. 11/11/01 at 72-73; Hoyt's Appx. 376b-377b).

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[3] Notably, Dr. Pachella based his opinion solely on Plaintiff's deposition testimony, a single photograph, and the *(continued. . .)*

G. THE APPELLATE COURT'S DECISION

On September 25, 2003, the Michigan Court of Appeals affirmed the trial court's ruling. *Ghaffari v. Turner*, 259 Mich App 608; 676 NW2d 259 (2003). In a published opinion, the appellate court determined that OSHA and MIOSHA do not impose additional duties on the defendant to ensure safety in the workplace. Instead, violations of OSHA and MIOSHA simply provide *evidence* of negligence. *Id.* at 613; 676 NW2d at 263.

The court also stated that the open and obvious doctrine was applicable in a construction setting:

> Michigan appellate courts have not expanded the open and obvious doctrine into a general contractor liability context. *See Perkoviq v Delcor Homes-Lake Short Pointe, Ltd*, 466 Mich 11, 19; 643 NW2d 212 (2002). But there is nothing in the history of the open and obvious doctrine, as summarized by the *Perkoviq* Court, to suggest that the doctrine should not apply in other contexts. *Id.* at 16-18. Moreover, we agree with the trial court's finding that, at least on these facts, the pipes on the floor presented an open and obvious condition. *Id.* at 614; 676 NW2d at 264.

The Michigan Court of Appeals affirmed the trial court on all counts based on the open and obvious nature of the pipes.

Importantly, however, the Michigan Court of Appeals provided alternate grounds for its decision. First, the Court held that Defendants, as a matter of law, owed no duty to Appellant:

> In fact, even if we were to conclude that the trial court erred in applying the open and obvious doctrine, we would nevertheless conclude that, as a matter of law, defendants did not owe plaintiff a duty to store the pipes that caused plaintiff's fall in a different manner. Consequently, we conclude that the trial court did not err in granting defendants' motion for summary disposition. *Id.* at 615; 676 NW2d at 264.

Further, the Court provided yet another basis for affirming the trial court's decision as to Turner. Under the rules of general contractor liability, a general contractor may be liable if (i) the general contractor retains control over a negligent subcontractor; (ii) the general contractor controls the job site shared by many subcontractors and the plaintiff is injured by a readily

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affidavit of Mr. Chris Mamp – an Affidavit that was rejected as impermissibly speculative by the trial court.

observable danger that created a "high risk" to a significant number of workers; or (iii) the work is inherently dangerous. *Funk v General Motors*, 392 Mich 91, 103-05; 220 NW2d 641 (1974); *Hughes v PMG Bldg*, 227 Mich App 1, 5-7; 574 NW2d 691 (1997). Here, the appellate court determined that Appellant had not established any of the necessary elements to demonstrate liability. *Ghaffari*, 259 Mich App at 615-16; 676 NW2d at 264-65. Consequently, the Court of Appeals affirmed summary disposition based on multiple holdings.

III. ARGUMENT

A. THE OPEN AND OBVIOUS DOCTRINE PROPERLY APPLIED TO THIS CASE

1. Standard of Review

This Court reviews the decision to grant or deny a motion for summary disposition *de novo*. *Spiek v. Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201, 204 (1998). This Court reviews *de novo* whether the open and obvious doctrine applies to bar a plaintiff's claim. *Riddle v. McClouth Steel Products*, 440 Mich 85, 95; 485 NW2d 676 (1992).

2. The Open And Obvious Doctrine: The Definition Of Hazardous Condition Under Michigan Law

Michigan has a long history of the open and obvious defense. The doctrine developed in the premises liability context as part of the common law definition of unreasonable hazardous conditions. The doctrine serves to define those conditions that are unreasonably dangerous.

The modern application of the open and obvious doctrine arose in the premises liability context in *Riddle v. McLouth Steel Products, Corp.*, 440 Mich. 85; 485 NW2d 676 (1992). In *Riddle*, the plaintiff, an employee of an independent contractor, slipped on oil. He brought a premises liability action against the owner of the premises alleging that the condition posed a hazard for which the owner owed him a duty to warn. After a jury verdict in favor of the plaintiff, the defendant appealed. This Court reversed the award, determining that no duty existed in Michigan to warn against dangers that were known or obvious. In doing so, the Court

recognized that a common law duty existed that required a premises owner to warn against all unreasonable *hazards.* Nevertheless, it found that conditions that were open and obvious did not fall within this category. This Court explained:

> A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. If the plaintiff is a business invitee, the premises owner has a duty to exercise due care to protect the invitee from dangerous conditions. *Beals, supra.* However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee. *Williams, supra.*
>
> Once a defendant's legal duty is established, the reasonableness of the defendant's conduct under that standard is generally a question for the jury. See *Smith v. Allendale, supra* 410 Mich. at 714, 303 N.W.2d 702. The jury must decide whether the defendant breached the legal duty owed to the plaintiff, that the defendant's breach was the proximate cause of the plaintiff's injuries, and thus, that the defendant is negligent.
>
> If, for example, the dangerous conditions on the premises are hidden or latent, the premises owner is obliged to warn the invitee of the dangers. Defendant's failure to warn under these circumstances may indicate a breach of the legal duty owed plaintiff. If the conditions are known or obvious to the invitee, the premises owner may nonetheless be required to exercise reasonable care to protect the invitee from the danger. *Quinlivan, supra* 395 Mich. at 260-261, 235 N.W.2d 732. What constitutes reasonable care under the circumstances must be determined from the facts of the case. While the jury may conclude that the duty to exercise due care requires the premises owner to warn of a dangerous condition, there is no absolute duty to warn invitees of known or obvious dangers. *Riddle,* 440 Mich at 95-97, 485 NW2d at 681-82 (footnotes omitted).

This Court clarified this rule in *Bertrand v. Alan Ford, Inc.*, 449 Mich. 606; 537 N.W.2d 185 (1995), and explained that the doctrine clarified *unreasonable* risks under Michigan law. The Court explained:

> With the axiom being that the duty is to protect invitees from *unreasonable* risks of harm, the underlying principle is that even though invitors have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees. *Quinlivan, supra* at 261, 235 N.W.2d 732. Consequently, because the danger of tripping and falling on a step is generally open and obvious, the failure to warn theory cannot establish liability. However, there may be special aspects of these particular steps that make the risk of harm unreasonable, and, accordingly, a failure to remedy the dangerous condition may be found to have breached the duty to keep the premises reasonably safe. *Bertrand,* 449 Mich. at 614, 537 NW2d at 188 (emphasis added, footnotes omitted).

In *Lugo v. Ameritech Corporation, Inc.*, 464 Mich. 512; 629 N.W.2d 384 (2001), this Court further refined the open and obvious doctrine by noting that it was an integral part of the definition of unreasonably dangerous conditions. This Court explained:

> The proper focus in this case is the extent of the open and obvious doctrine in premises liability cases. In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand v. Alan Ford, Inc.*, 449 Mich. 606, 609; 537 N.W.2d 185 (1995). However, this duty does not generally encompass removal of open and obvious dangers:
>
> > [W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee. [*Riddle v. McLouth Steel Products Corp.*, 440 Mich. 85, 96; 485 N.W.2d 676 (1992).]
>
> Accordingly, the open and obvious doctrine should not be viewed as some type of "exception" to the duty generally owed invitees, but rather as an integral part of the definition of that duty. *Lugo,* 464 Mich. at 516, 629 NW2d at 386 (footnotes omitted) (emphasis added).

Following this precedent, courts have applied the open and obvious doctrine not only to claims of failure to warn, but also to claims arising out of a duty to protect against allegedly unreasonably dangerous conditions. In *Milliken v. Walton Manor Mobile Home Park, Inc.*, 234 Mich App 490, 495; 595 NW2d 152, 155 (1999), the Michigan Court of Appeals clarified that the open and obvious doctrine applies to all claims of negligence on a premises, including the duty to protect patrons from unreasonably dangerous conditions. The Court explained:

> On the basis of *Riddle* and *Bertrand* and their analysis of applicable precedents, we conclude that the open and obvious doctrine applies to this premises liability case, notwithstanding plaintiff's avoidance of a "failure to warn" allegation in drafting her complaint. The logic of these cases, as well as the language they employed, demonstrates that the doctrine protects against liability whenever injury would have been avoided had an "open and obvious" danger been observed, regardless of the alleged theories of liability. Here, regardless of plaintiff's allegations that defendant allowed the support wire to be where it was in an unreasonable and negligent manner, the simple fact is that plaintiff would not have been injured had she noticed the wire. Accordingly, the open and obvious doctrine was properly applied by the trial court. *Milliken,* 234 Mich. App. at 495-497, 595 NW2d at 155-56 (footnotes omitted).

This Court also has used the doctrine to define risk of harm in product liability cases. *See Glittenberg v. Doughboy Recreational Industries, Inc.*, 436 Mich. 673; 462 N.W.2d 348 (1990) (*Glittenberg I*). In each case, the Court expressly used the doctrine to define the hazardous conditions under Michigan law.

Following *Riddle, Bertrand, Lugo,* and *Milliken*, the open and obvious doctrine remains an integral part of Michigan law. Rather than limiting a portion of claims in Michigan, the doctrine serves to define the common law duty to protect against unreasonable hazards under Michigan law regardless of the theories of liability.

3. The Open And Obvious Doctrine Defines Unreasonable Hazards

Regardless of legal theories, the crux of liability in any theory arising in the present case was whether an unreasonably dangerous condition existed on the property. Because the open and obvious doctrine serves to define whether that condition exists, the lower courts properly used it in the context of this case. In doing so, the Michigan Court of Appeals used a common sense approach that brings harmony to claims arising out of similar duties.

In premises liability actions, the general rule is that a premises owner has a duty to exercise due care to protect an invitee from dangerous conditions that exist on the premises. *Knight v. Gulf & Western,* 196 Mich App 119, 124; 492 NW2d 761, 765 (1992). In the present case, Appellant maintains that the general contractors and the subcontractors had a common law duty to protect him from an alleged dangerous condition on the premises. Like any ordinary premises liability claim, Appellant alleges that Defendants had a duty to exercise due care to protect an invitee from dangerous conditions that existed on the premises. The two claims are exactly the same. Both claims are based upon the same common law duty to protect against a condition of the premises.

Given this similarity, the Court of Appeals' application of the open and obvious doctrine to bar Appellant's action was correct. Contrary to Appellant's assertions, there is no open and obvious exception under Michigan law for premises claims that involve claims of general or subcontractors. In fact, the Court of Appeals previously has applied the open and obvious doctrine to cases in the construction context. *See Wade v. Rouge Steel Co.*, 1996 WL 33347773 (Mich Ct App, December 13, 1996); *Farah v. Stellar Building & Development*, 1997 WL 33352827 (Mich Ct App, May 9, 1997). In these cases, the doctrine applied *regardless* of the status of the Defendant.

For example, in *Farah v. Stellar Building & Development*, 1997 WL 33352827 (Mich Ct App, May 9, 1997), the plaintiff, an independent engineer, fell on wet concrete after being hired by the general contractor. He brought suit against the general contractor who had control over the project. Applying the open and obvious doctrine, the trial court granted summary disposition to the general contractor. The Court of Appeals affirmed. The Court explained that there could be no liability because open and obvious conditions are not hazardous conditions that give rise to a duty to protect or warn. The Court noted:

> Whether the open and obvious danger doctrine applies to bar plaintiff's claim is a question of law reviewed de novo by this Court. See *Riddle v. McClouth Steel Products,* 440 Mich. 85, 95; 485 NW2d 676 (1992).
>
> > [W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee. [*Id.* at 96.]
>
> As a general rule, a business invitor owes a duty to its customers to maintain its premises in a reasonably safe condition and to exercise ordinary care to keep the premises reasonably safe. *Schuster, supra* at 565. The "open and obvious danger" rule is a defensive doctrine that attacks the duty element of a negligence claim. *Riddle, supra* at 95. The doctrine is based on the standard outlined in 2 Restatement Torts, 2d, § 343A(1), which provides:
>
> > A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to

> them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.* [*Riddle, supra* at 94 (emphasis supplied).]
>
> Therefore, a business invitor owes no duty to warn or protect customers from dangers that are so obvious that invitees should be reasonably expected to discover them on their own. *Id.* Whether a danger is open and obvious depends on whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection.
>
> Summary disposition was properly granted. The danger here was obvious to plaintiff and, as plaintiff conceded, he could have gone around the trench to reach the sample. Indeed, plaintiff knew the concrete was wet and he was injured only after successfully crossing the point of danger and returning to it on his way back across the trench. This falls clearly within the doctrine set forward in *Riddle, supra.* Summary disposition was proper because the danger was open and obvious and the risk of harm was not unreasonable. *Farah*, 1997 WL 33352827 at *** 2-3.

In *Perkoviq v. Delcor Homes-Lake Shore Pointe*, 466 Mich. 11; 643 N.W.2d 212 (2002), this Court applied the open and obvious doctrine in a claim involving an owner/general contractor. In *Perkoviq*, an employee of one subcontractor was injured on a job site when he slipped on an icy roof. He brought suit against the owner and general contractor, claiming they owed him duties under common law doctrines of premises liability and *Funk.* After the Court of Appeals overturned the trial court's grant of summary disposition on behalf of the owner, this Court reversed. Although this Court did not decide the precise issue here, the Court nevertheless applied the open and obvious doctrine to bar the premises liability claims.[4] *Perkoviq,* 466 Mich. at 18-19, 643 NW2d at 217 (emphasis added).

Given this precedent, the Court of Appeals correctly applied the open and obvious doctrine to the present case. Like an ordinary premises liability claim, Appellant's claims alleged that Defendants owed him a duty to protect and warn against a dangerous condition on a property. All claims involve the same essential elements. Accordingly, the decision of the Michigan Court of Appeals was correct.

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[4] The *Perkoviq* Court did note that the lower courts had "held that [the] case did not come within the exception to the general principle that general contractors are not liable for injuries to subcontractors' employees."

4. The *Ormsby* Case And The Common Work Area Test Are Consistent With The Open And Obvious Doctrine

Appellant argues that the open and obvious doctrine should not have been applied to this case because a separate and distinct duty arises in *Funk v. General Motors Corp.*, 392 Mich. 91; 220 N.W.2d 641 (1974) and *Ormsby v. Capital Welding, Inc.*, 471 Mich. 45, 55-56; 684 N.W.2d 320, 326-27 (2004). Appellant implicitly claims that the duty placed upon general contractors to protect the workplace is greater than the general duty placed upon ordinary premises owners in premises liability actions. Appellant's argument, however, is misplaced for two reasons. First, Appellant makes no distinction between the roles of each of the Defendants here. Contrary to Appellant's implication, *Funk* and *Ormsby* have no application to other subcontractors and do not place an additional duty upon Appellee Hoyt. Second, a careful review of *Funk* and *Ormsby* demonstrates that the duty placed upon a general contractor in the construction context is essentially the same as that placed upon the ordinary possessor of land. Both recognize a duty only where a "high degree" of risk exists on the premises. Since the open and obvious doctrine serves to define hazards that have a "high degree" of risk, the Court of Appeals properly applied the doctrine to Appellant's claims.

i. The Common Work Area Test Does Not Apply To Other Subcontractors.

Appellant failed to differentiate between Defendants and thus implicitly argued that *Funk* and, consequently, *Ormsby*, apply to other subcontractors. Appellant's attempt to apply *Funk* to other subcontractors is contrary to established Michigan law. In *Hughes v. PMG Building, Inc.*, 227 Mich. App. 1; 574 N.W.2d 691 (1998), the Michigan Court of Appeals expressly ruled that the *Funk* analysis had no application to other subcontractors:

> Plaintiff's final argument on appeal is that a genuine issue of fact existed regarding its negligence claim against State Carpentry. We disagree. The "common work area" exception under *Funk [v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974)], which can impose liability on a general contractor, does not apply where the employee

> of one subcontractor seeks to recover from another subcontractor. *Funk*, *supra* at 104 n 6 . . . . Instead, the immediate employer of a construction worker is generally responsible for job safety. *Funk*, *supra* at 102 . . . . Plaintiff was working on the construction site as an independent contractor. He was not invited onto the site by State Carpentry [the carpentry subcontractor], and did not use State Carpentry's equipment. As such, State Carpentry had no duty to make the premises safe for plaintiff or to warn plaintiff of a known dangerous condition. See *Klovski v Martin Fireproofing Corp*, 363 Mich 1, 5; 108 NW2d 887 (1961). We therefore conclude that the trial court properly granted summary disposition in favor of State Carpentry. *Hughes*, 227 Mich. App. at 12-13; 574 NW2d at 696.

Here, both Appellant and Hoyt were working at the IMAX construction site as subcontractors. Based on *Hughes*, subcontractors are not charged with any duty under *Funk*. Appellant's reliance upon *Funk* for his argument that the trial court misapplied the open and obvious doctrine to Appellee Hoyt is therefore incorrect. *See also Klovski v. Martin Fireproofing Corp.*, 363 Mich. 1, 5; 108 N.W.2d 887, 890 (1961) (applying the open and obvious doctrine to claims against a subcontractor). Appellant's claims against Hoyt are based on simple negligence principles and, as argued *infra*, Appellant cannot maintain this cause of action against Hoyt.

ii. *Funk* And *Ormsby* Are Consistent With The Open And Obvious Doctrine

Nonetheless, in the event that Hoyt is somehow held to the standard of a general contractor (which is highly unlikely), Hoyt addresses this Court's request to brief the issues surrounding the open and obvious doctrine in relation to this Court's decision in *Ormsby*. Hoyt supports co-defendant Turner's argument that general contractors/construction managers, like property owners, may invoke the open and obvious defense in a construction accident case. Neither *Funk* nor *Ormsby* imposes a duty upon a general contractor initially divergent from those duties placed upon a possessor of a premises. The duty expressed by this Court in *Funk* and later clarified in *Ormsby* is entirely consistent with the duty defined by the open and obvious doctrine. Both can and should be read in harmony.

A close review of *Funk* demonstrates that the duties expressed there are virtually indistinguishable from those in an ordinary premises liability. In *Funk*, the plaintiff, an employee of a subcontractor, was injured on a job site. He brought suit against the owner of the premises and the general contractor, alleging each owed him a duty to warn and protect against the dangers in a common work area. In the limited circumstances presented by *Funk*, the Court found that a duty existed. This duty, however, was not without limitation. Specifically, the duty applied only where a "high degree of risk" was present in a common work area such that it presented this risk to a "significant number of workmen." The Court explained:

> We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workman. *Funk*, 392 Mich. at 91, 220 NW2d at 646.

The expression of this duty in *Funk* is consistent with the duty placed upon possessors of property. Both recognize duties to protect only if a high degree of risk exists. Indeed, the *Funk* Court's use of the limiting phrase "high degree" before the word "risk" demonstrates that, like a possessor of land, a general contractor does not have to protect against all risks, but only those certain risks that pose a "high degree" of danger. An open and obvious danger is not a danger of "high degree."[5]

The Court of Appeals agreed with this approach in *Davis v. Barton-Malow Co.*, 2001 WL 633662 (Mich Ct App, June 1, 2001). In that case, the plaintiff was injured on a construction project when she attempted to step over two metal beams which were lying over an area that later became a sidewalk. She sued the general contractors and those subcontractors whom she

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[5] Apparently failing to consider the language of the *Funk* opinion, Appellant implies that a general contractor is strictly liable under *Funk* simply because his accident occurred. Far from compelling strict liability upon general contractors for all "dangers" or "hazards" on a property, this Court expressly recognized that some risks would not give rise to a duty upon a general contractor. The Court noted:

> In some instances, as to some risks, at [sic] will appear unwarranted to impose the responsibility on anyone other than the immediate employer of the workman, whether he be a subcontractor or general contractor.

Funk, 392 Mich. at 109-10, 220 NW2d at 649.

claimed were responsible for the condition. The trial court granted summary disposition under the open and obvious doctrine. On reconsideration, the trial court affirmed its ruling on the claims of liability under *Funk*, recognizing that this language in *Funk* was similar to the open and obvious doctrine. The Court of Appeals affirmed. In doing so, the Court undertook the same type of analysis that is required under the open and obvious doctrine in an effort to determine whether a "high degree of risk" existed. The Court explained:

> In discussing the "high degree of risk factor," the Court in *Funk* stated:
>
> > Mishaps and falls are likely occurrences in the course of a construction project. To completely avoid their occurrence is an almost impossible task. However, relatively safe working conditions may still be provided by implementing reasonable safety measures to prevent mishaps from causing *aggravated injuries* such as those suffered by Funk. [*Funk, supra* at 102-103 (emphasis added).]
>
> **The proposition that a "high degree of risk" involves a risk of harm that is somewhat out of the ordinary, and would entail something more than a common occurrence involving someone tripping over construction materials, is supported by subsequent cases discussing the retained control doctrine**. *Groncki, supra* at 664 (liability for electrocution of workman who was delivering masonry supplies by contact with uninsulated power lines); *Plummer v. Bechtel Constr Co,* 440 Mich. 646, 653-654; 489 NW2d 66 (1992) (injury sustained from falling twenty feet from a catwalk, striking a steel girder and then falling ten more feet onto a work shed); *Phillips v. Mazda Motor Mfg (USA) Corp,* 204 Mich.App 401, 405; 516 NW2d 502 (1994) (decedent pinned by seven ton steel truss and cut in half). In light of plaintiff's deposition testimony, we do not believe that the metal beams created "a high degree of risk to a significant number of workers.
>
> **Plaintiff admits that the beams over which she tripped were visible and that she was aware of their location and existence**. Additionally, although plaintiff maintains that she was required to negotiate her way around the beams to complete her rounds, she also testified that she had walked over the beams at least once and around the beams twice on the day of her accident, thus indicating that the beams were navigable and avoidable. Under the circumstances, we conclude that the risk of injury here, that of tripping over building materials on the ground at a construction site, did not constitute the requisite "high degree of risk" to impose liability. *Davis*, 2001 WL 633662 at ** 2-3 (emphasis added).

See also Wade v. Rouge Steel Co., 1996 WL 33347773 (Mich Ct App, Dec. 13, 1996) (applying the open and obvious doctrine to a duty arising out of *Funk*).

As *Davis* and *Wade* implicitly recognized, courts make the same determination as to the "high degree of risk" necessary in *Funk* or a premises liability case. Both analyses involve similar duties to protect against *unreasonable* hazards, but not open and obvious conditions. The Court of Appeals agreed in this case, stating that "there is nothing in the history of the open and obvious context . . . to suggest that the doctrine should not apply in other contexts." *Ghaffari*, 259 Mich App at 612-13, 676 NW2d at 263.

Further, the "common work area test" recently announced in *Ormsby* harmonized the earlier case law as stated in *Funk* and further reinforces that any danger must be "unreasonable" and pose a "high degree of risk." This Court stated that:

> The doctrines of "common work area" and "retained control" are not two distinct and separate exceptions. Rather, under the "common work area doctrine," a general contractor may be held liable for the negligence of its independent subcontractors only if all the elements of the four-part "common work area" test set forth in *Funk* have been satisfied. Further, the "retained control doctrine" is subordinate to the "common work area doctrine" and simply stands for the proposition that when "the common work area doctrine" would apply, and the property owner has stepped into the shoes of the general contractor, thereby "retaining control" over the construction project, that owner may likewise be held liable for the negligence of its independent subcontractors. 471 Mich at 60, 684 N.W.2d at 329.

The *Ormsby* "common work area doctrine" requires the plaintiff to prove four elements: (1) that the defendant contractor (or owner who retained control) failed to take reasonable steps within its supervisory and coordinating authority; (2) to guard against readily observable and avoidable dangers; (3) that created a **high degree of risk** to a significant number of workers; (4) in a common work area. *Ormsby*, 471 Mich at 57, 684 N.W.2d at 327-28 (emphasis added). Unlike some prior Michigan case law, the *Ormsby* decision indicated that the "retained control" portion of the test is *subordinate* to the "common work area doctrine." *Id.*

At first blush, the *Ormsby* test may appear to conflict with the open and obvious doctrine. After all, under *Ormsby*, general contractors must prevent readily observable dangers. **However,** *Orsmby* further states that the general contractor only must prevent readily and observable

dangers that ***pose a high degree of risk to a significant number of workers***. The *Ormsby* test is consistent with the *Lugo* open and obvious doctrine because both defenses hold an owner/contractor liable only for dangers that **pose a special aspect or high degree of risk** (*e.g.*, the large tar pit discussed in *Lugo*). If the condition does not have a special aspect or pose a high degree of risk, then the condition may be open and obvious to a normal, casual observer. If so, then neither the premises owner, the general contractor, nor the subcontractor at the site should owe a duty to the potential plaintiff to remedy an open and obvious danger. In either context, the test is one of reasonableness, namely whether the condition posed an unreasonable or significant risk of harm to the plaintiff.

The Court of Appeals adopted this approach in this case and determined that the open and obvious doctrine applied in a construction context with respect to *all* defendants, even the general contractor. Finding that the pipes on the floor in the storage room presented an open and obvious condition, the Court of Appeals affirmed the trial court's order granting summary disposition to all defendants. Even assuming that the pipes on the floor constituted a "high degree of risk," the Court also held, *in the alternative*, that plaintiff could not sustain a claim under the common work area test because the pipes did not pose a risk to a "high degree of risk to a significant number of workers." *Ghaffari*, 259 Mich App at 614; 676 NW2d at 264.

The decision of the Court of Appeals in this case illustrates the proper balancing tests and analysis that should apply to construction cases. The Court of Appeals first examined the open and obvious doctrine and held that Appellant's claims were barred. Alternatively, the Court reinforced its holding by analyzing the case under the common work area theory stated in *Funk* and later clarified in *Ormsby*.[6] Hoyt requests that this Court follow this approach and AFFIRM

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[6] Undoubtedly the Court could have relied on the open and obvious defense as the sole basis for its holding. The alternative holding further shows the invalidity of Plaintiff/Appellant's claims.

the decisions of the trial court and Michigan Court of Appeals.

5. The Open And Obvious Doctrine Is Consistent With Principles Of Comparative Negligence

In *Lugo v. Ameritech Corp., Inc.*, 464 Mich 512; 629 NW2d 384 (2001), this Court set forth the open and obvious doctrine as it pertained to a premises liability action. This Court held:

> In sum, the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk. *Id.* at 517, 629 NW2d at 386.

In the absence of a special aspect, the premises owner owes the invitee no duty; issues of comparative negligence are irrelevant. *Id.* at 524, 629 NW2d at 390.

The *Lugo* Court addressed the issue of comparative negligence with respect to the open and obvious doctrine and found the two defenses to be consistent:

> While we agree with the result reached by the trial court, we consider it important to disapprove part of its apparent rationale. The trial court's remarks indicate that it may have granted summary disposition in favor of defendant because the plaintiff "was walking along without paying proper attention to the circumstances where she was walking." However, in resolving an issue regarding the open and obvious doctrine, the question is whether the condition of the premises at issue was open and obvious and, if so, whether there were special aspects of the situation that nevertheless made it unreasonably dangerous. ***In a situation where a plaintiff was injured as a result of a risk that was truly outside the open and obvious doctrine and that posed an unreasonable risk f harm, the fact that the plaintiff was also negligent would not bar a cause of action. This is because Michigan follows the rule of comparative negligence. Under comparative negligence, where both the plaintiff and the defendant are culpable of negligence with regard to the plaintiff's injury, this reduces the amount of damages the plaintiff may recover but does not preclude recovery altogether.*** (citation omitted) (emphasis added).
>
> Accordingly, it is important for courts in deciding summary disposition motions by premises possessors in "open and obvious" cases to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff. In the present case, there was no evidence of special aspects that made the open and obvious pothole unreasonably dangerous. *Id.* at 523-24; 629 NW2d at 389-90.

Put another way, the court first must determine whether the danger was "open and obvious" to an objective observer or whether special aspects made the condition unreasonably

dangerous. If the condition is open and obvious, then the possessor/contractor owes no duty to the injured party to make the premises safe. The case ends. If, however, a special aspect of the condition proves unreasonably dangerous, has a "special aspect" as defined in *Lugo*, or if the activity involved is inherently dangerous, then the open and obvious doctrine does not apply, but defendant still may be entitled to argue the defense of comparative negligence. The open and obvious doctrine defines the ***duty*** that the possessor/contractor owes to the plaintiff. Comparative negligence, as noted in *Lugo*, apportions fault among the parties once the duty has been imposed. There is no inconsistency between these two principles of Michigan negligence law.

6. The Open And Obvious Doctrine Is Consistent With This Court's Decision In *Hardy v. Montsanto Environ-Chem Systems, Inc.*

Despite the *Lugo* precedent, Plaintiff-Appellant contends that the case of *Hardy v. Monsanto Environ-Chem Systems, Inc.*, 414 Mich. 29; 323 NW2d 270 (1982), implies that the open and obvious doctrine has no applicability in light of comparative negligence and that the decision somehow "barred" common law defenses in construction accident cases. (*See* Appellant's Brief on Appeal at 20-21). This approach misstates the majority holding in *Hardy* and fails to take account of modern Michigan case law.

This Court issued the *Hardy* decision in 1982 when Michigan law first wrestled with notions of comparative negligence. Since that time, Michigan jurisprudence has embraced both comparative negligence and the open and obvious doctrine to negate liability for a defendant when a plaintiff has contributed to or caused the injury in question. *See e.g., Lugo, supra.* Michigan torts now require a finding of comparative fault when applicable. MCL § 600.6304.

Importantly, *Hardy*, contrary to Appellant's assertions, addressed *only* the common law defense of contributory negligence and did not "ban" common law defenses in a contractor liability setting. *See Hardy*, 471 Mich at 40-41, 323 NW2d at 274. Appellant equates *Hardy*'s discussion regarding contributory negligence as imposing a similar defense to the open and

obvious doctrine. These two defenses, however, differ greatly in their application.

Under a theory of contributory negligence, a defendant could avoid *all* liability if the defendant could show the slightest bit of fault on the part of the plaintiff. Contributory negligence was an "all or nothing" defense that arguably permitted defendants to ignore safety concerns and instead blame the victim in construction injury cases. Plaintiffs faced a difficult task in trying to show that they were not *at all* at fault in order to sustain their causes of action. *See Hardy*, 414 Mich at 39-41; 323 NW2d at 274. *Hardy* and *Funk* took account of this unfair approach in a construction context and both cases refused to allow a construction manager or general contractor to use *contributory negligence* as a defense in a construction accident case. *See Hardy*, 414 Mich at 39-41; 323 NW2d at 274.

In contrast, the open and obvious defense imposes a neutral balancing test viewed from the standpoint of a reasonable person rather than the plaintiff. If a reasonable person would not have found the condition to be an open and obvious hazard, then the case continues and the defendant may try to demonstrate comparative negligence (if possible) as to the plaintiff. *See Lugo*, 464 Mich at 523-24; 629 NW2d at 389-90.

Further, unlike the defense of contributory negligence, the open and obvious doctrine does not apply if the activity is inherently dangerous or if an unreasonably hazardous condition exists. *Lugo,* as one example, outlined an open tar pit as an unreasonably dangerous hazard. Other Michigan cases have demonstrated similar conditions that were deemed unreasonably dangerous. Similarly, some of the laundry list of items listed in Appellant's Brief on Appeal likely would fall into this category of "unreasonably dangerous hazards" to which the open and obvious doctrine would not apply. In such cases, a plaintiff could avoid the defense by demonstrating the unreasonable nature of the hazardous condition.

Additionally, Appellant, like the plaintiff in *Hardy*, contends that the open and obvious defense will permit contractors to avoid safety responsibilities at the worksite. Such a result is unlikely to occur for various reasons:

- First, general contractors and construction managers must comply with MIOSHA and OSHA regulations, as well as other applicable state and federal laws, or face substantial civil and criminal penalties.

- Second, unlike store customers, construction workers should have the benefit of worker's compensation if they sustain any injury on the job. Employers, who are the primary entities responsible for employee safety, will ensure safety to avoid worker accidents as a means to keep worker's compensation insurance in check and avoid such claims.

- Third, construction contractors cannot assume that a particular hazard will be deemed an "open and obvious" condition. It is extremely unlikely that such contractors would assume the risk of a particular court's interpretation of the open and obvious doctrine so that the contractor tosses safety to the wind and avoids compliance with safety standards and regulations.

Notably, this Court has permitted property owners (*e.g.,* storekeepers) to avoid liability to invitees (*e.g.,* customers) when the invitee fails to observe an open and obvious danger. *See Lugo, supra*. Certainly store customers who are at the store to *purchase* items should be entitled to the same protections as workers at a construction site who are presumably trained to work at the site and paid for their work. Although the *Lugo* opinion did not address—and never implied—whether the doctrine could apply in a construction context, there is no reason to distinguish between a premises owner and a contractor at a worksite. Both have specific duties to the public and/or employees, but neither one should have to prevent injury to an open and obvious nature absent special circumstances.

B. THE MICHIGAN COURT OF APPEALS' DECISION WAS CONSISTENT WITH MIOSHA

Appellant next argues that the open and obvious doctrine should not have been applied to this case because it undermines the statutory requirements of OSHA and/or MIOSHA. Like the duties allegedly imposed by *Funk* and *Ormsby*, OSHA or MIOSHA has no application to other

subcontractors and does not place an added duty on Hoyt. Moreover, OSHA and/or MIOSHA can and should be read in harmony with Michigan common law.

1. MIOSHA Does Not Apply To Bind Other Subcontractors

Contrary to Appellant's implication, MIOSHA does not require subcontractors on a construction site to protect employees of other subcontractors. MIOSHA is remedial legislation that should be liberally construed to accomplish its statutory purpose. *Barker Bros. Construction v. Bureau of Safety & Regulation,* 212 Mich App 132, 138; 140, 536 N.W.2d 845 (1995). The broad objective of the MIOSHA is "to provide all employees with a work site free from recognized hazards." *Id.* at 139, 536 N.W.2d 845. The act is intended to protect employees within their own workplaces where the common law no longer affords them protection. *See generally Hottman v. Hottman*, 226 Mich. App. 171, 178-179; 572 N.W.2d 259, 263 (1998).

On its face, MIOSHA applies only to the employer/employee relationship and does not statutorily require that subcontractors protect the employees of other subcontractors. The statute defines its scope as setting "forth general rules for. . . . safe work practices pertaining to all employers and employees performing construction operations. . ." *See* R. 408.40101. Under Michigan law, MIOSHA is applicable only where one person or entity that pays compensation to another person. *See Hottman v. Hottman*, 226 Mich. App. 171, 178-179; 572 N.W.2d 259, 263 (1998). As explained in *Hottman*:

> We believe that linking the word "employ" with the payment of compensation to the employee is in accord with the common and approved usage of the word. See *USAA Ins. Co. v. Houston General Ins. Co.,* 220 Mich.App. 386, 391, 559 N.W.2d 98 (1996). Moreover, previously this Court, relying on federal precedent interpreting the Occupational Safety and Health Act [FN3] to determine that an employer who also worked at the place of employment was an employee under the MIOSHA, noted that "'[c]overage of the employer is also required since ... *any individual receiving financial return from a business for work performed is an employee.*' " *Barker Bros., supra* at 139, 536 N.W.2d 845, quoting *Secretary of Labor v. Howard M Clauson, d/b/a Howard M Clauson Plastering Co,* 5 OSHC 1760 (1977) (emphasis added). *Hottman*, 226 Mich. App. at 178-179, 572 NW2d at 263 (footnotes omitted).

In the present case, Appellee Hoyt did not pay compensation to Appellant or employ Appellant. Hoyt was simply another subcontractor on the scene. Therefore, MIOSHA does not require Hoyt to protect any employees of other subcontractors at the site, including Appellant.

None of the cases relied upon by Appellant alter this rule. In fact, Appellant's cited cases involve the obligations of a *general contractor*, not that of another *subcontractor*. *See Beals v. Walker*, 416 Mich. 469; 331 N.W.2d 700 (1982); *Johnson v. Billot*, 109 Mich. App. 578; 311 NW2d 808 (1981); *Teal v. E.I. Dupont De Nemours and Company*, 728 F.2d 799 (6th Cir. 1984). Accordingly, Appellant's argument that MIOSHA precludes application of the open and obvious doctrine against Defendant Hoyt is misplaced.

2. The Open And Obvious Doctrine Can And Should Be Read In Harmony With MIOSHA Because It Defines Applicable Hazards

Appellant's reliance on MIOSHA is also misplaced since MIOSHA can and should be read consistently with the open and obvious doctrine. Despite Appellant's numerous MIOSHA citations, none create a greater duty than that created at common law. A fair review of MIOSHA reveals that it encompasses the same duties expressed at common law and is wholly consistent with the open and obvious doctrine.

For instance, Appellant relies heavily upon MIOSHA R. 408.40119. This rule requires that the "floor of a work area or aisle shall be maintained in a manner that does not create a hazard to an employee." Similarly, MIOSHA R. 408.40818 also requires that such areas "be kept free of the accumulation of materials that constitute a hazard to the movement of . . .employees." These rules, however, recognize precisely the same duty that is recognized at common law. Like common law premises liability claims, each of these citations refers to duties to alleviate trip "hazards" in the workplace.

The Michigan appellate courts routinely have found that open and obvious trip conditions are not "hazards" under Michigan law. *See e.g. Milliken v. Walton Manor Mobile Home Park,*

Inc., 234 Mich App 490, 495; 595 NW2d 152, 155 (1999). The common law seeks to protect patrons and other citizens lawfully on the property from hazards; MIOSHA seeks to serve the same purpose in the workplace. Both MIOSHA and premises liability can be read consistently, *i.e.,* open and obvious conditions are not dangers (absent special circumstances) under Michigan law.

Further, by enacting MIOSHA, the Legislature expressly intended to preserve the common law defense of open and obvious danger, not abrogate it. *See* MCL 408.1002; MSA 17.50(2) ("Nothing in this act shall be construed to supersede or in any manner affect any workers' compensation law, or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."). In this case, the Court of Appeals noted that MIOSHA and OSHA do not "enlarge or diminish" other rights under the common law. Although MIOSHA and OSHA regulations may establish evidence of negligence, no Michigan case has indicated that such regulations impose a specific statutory duty in a negligence context. *Ghaffari*, 259 Mich App at 613, 676 NW2d at 263.

Additionally, private lawsuits are not the recognized and proper mechanism for the enforcement of MIOSHA safety regulations. *White v Chrysler Corp,* 421 Mich 192, 199; 364 NW2d 619, 622 (1984). Rather, MCL § 408.1028; MSA § 17.50(28) provides that an aggrieved employee who has knowledge of a violation of a safety standard may lodge a complaint with the Department of Labor, which may then investigate the circumstances of the complaint. If a violation exists, a monetary penalty may be imposed on the employer once the Department of Labor has issued a citation. MCL § 408.1033, .1035; MSA § 17.50(33), (35). The recognition of the open and obvious danger doctrine in tort claims against employers who may have violated

MIOSHA standards does not and will not jeopardize the enforcement of governmental safety standards.

Appellee Hoyt is unaware of any Michigan cases (other than this one) that have directly addressed the issue whether a violation of a safety statute or regulatory standard precludes application of the open and obvious danger rule. Instead, as noted in the Court of Appeals' opinion in this case, the MIOSHA regulations do not impose a statutory duty, but rather simply provide *evidence* of negligence. In *Douglas v. Edgewater*, 369 Mich 320, 328; 119 NW2d 567, 571 (1963), this Court stated that such regulations impose no specific duty and could be, at most, evidence of negligence:

> There can be no question but that under existing opinions of this Court, the violation of a statute is negligence per se. However, no authority is cited for the proposition that the violation of a duty imposed by administrative rules and regulations issued under statutory authority is negligence per se; nor have we been able to find any such precedents in Michigan. In the absence of specific language in the statute incorporating by reference other materials, there is simply no such authority. We hold further that violations of duties imposed by such rules and regulations are *evidence of negligence*. (emphasis added)

Appellant cannot now use MIOSHA regulations to create or extend a duty for Hoyt when one does not exist at common law. *See Pavia v. Ellis-Don Michigan, Inc.*, 2001 WL 1511837 (Mich Ct App, Nov. 27, 2001).[7] Nor can Appellant's proposed expert, Mr. Pachella, provide any evidence of an alleged "duty" as to Hoyt. An expert cannot create a duty because that area is exclusively the province of the courts. *Pavia v. Ellis-Don Michigan, Inc.*, 2001 WL 1511837 (Mich Ct App, Nov. 27, 2001), citing *Reeves v. Kmart Corp*, 229 Mich App 466, 475; 582 NW2d 841 (1998).

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[7] Appellant's reliance on the case of *Zalut v. Anderson & Associates*, 186 Mich App 229, 463 NW2d 236 (1990) is misplaced. *Zalut* stated that MIOSHA regulations were evidence of negligence. Similarly, the court did not find that MIOSHA created a new or statutory duty, but only that the defendants could present the MIOSHA evidence against the plaintiff as evidence of comparative negligence. *Id.* at 235-236, 463 NW2d at 239. Similarly, the case of *Jones v. Enertel, Inc.*, 467 Mich 266, 650 NW2d 334 (2002), addressed a specific statutory duty imposed on the City to maintain the sidewalk in reasonable repair. No such *statutorily imposed duty* exists here.

Further, other state and federal courts that have addressed similar issues have held that violation of a safety statute or regulatory standard does not preclude application of the open and obvious danger doctrine, even where the violation establishes negligence *per se*. *See Brient v Petro PSC, L.P.*, 134 F3d 370; 1998 WL 30824 (CA 6, Jan. 28, 1998); *Maky v Pattersons, Inc*, 1996 WL 649156 (Ohio Ct App, July 5, 1996); *Rosas v Doreen*, 402 SW2d 813 (Tx Ct App, 1966). In *Brient, supra*, the Sixth Circuit Court of Appeals examined Tennessee negligence law and aptly stated the absurdity of the position that a statutory violation can be used to abrogate the open and obvious danger doctrine in an ordinary action for negligence:

> . . . [T]here is no duty, and therefore no cause of action for negligence, when the hazard in question is open and obvious. This is so regardless of how "negligent" the defendant's conduct ordinarily would appear to be. **It would be quite anomalous if the "open and obvious" rule permitted a defendant to escape liability for even truly dangerous conduct as long as such conduct was not in violation of a statute, but permitted liability any time a statutory standard of care was breached.** *Brient*, 1998 WL 30824 at **4 (emphasis added).

In light of the foregoing, the appellate court correctly rejected Appellant's argument that the alleged violations of safety regulations in this case preclude application of the open and obvious danger doctrine. This Court should AFFIRM the decision of the Michigan Court of Appeals.

C. THE LOWER COURTS PROPERLY APPLIED THE OPEN AND OBVIOUS DOCTRINE

1. Standard of Review

A trial court's decision to grant or deny a motion for summary disposition is reviewed *de novo* by this court. *Spiek v. Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201, 204 (1998).

2. Appellant's Testimony And The Facts Of This Case Support The Trial Court's Application Of The Open And Obvious Doctrine

An open and obvious danger is one that an "ordinarily prudent" person would typically be able to see and avoid. *Lugo v Ameritech Corp, Inc*, 446 Mich 512; 629 NW2d 384 (2001).

Whether a condition is open and obvious depends on whether it is noticeable to an ordinary user upon casual inspection. *Novotney v. Burger King,* 198 Mich App 470, 475; 499 NW2d 379, 381 (1993). A condition is open and obvious if "an average user with ordinary intelligence has been able to discover the danger and the risk presented upon casual inspection." *Id.* at 474-475, 499 NW2d at 381.

In *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470; 499 NW2d 379 (1993), the Court of Appeals considered a highly-visible premises "defect" similar to the open and obvious copper pipes in the instant case. In *Novotney*, the plaintiff fell and was injured when she stepped from a sidewalk and onto a handicap access ramp at the defendant's fast food restaurant. The plaintiff in *Novotney* explained that she fell on the ramp because she did not expect the presence of the incline, not because a reasonable person could not have seen the ramp and assessed its danger on casual inspection. *Id.* at 472, 474-475, 499 NW2d at 381. The Court rejected the plaintiff's own carelessness as a proper basis for imposing liability on the defendant:

> A sidewalk, with a handicap ramp, is for all practical purposes a simple product. Its nature, as well as any dangers presented, is apparent upon casual inspection by an average user with ordinary intelligence. That is, a person can observe in what direction a sidewalk goes, and what incline the sidewalk presents, upon casual inspection. There is no indication in this case that plaintiff could not have determined the existence of the handicap access ramp, or the incline of that ramp, had she inspected the sidewalk in front of her. The allegations are only that she did not discover the nature of the handicap access ramp and that she would have been more likely to discover the ramp had warning signs been posted or had the ramp been painted a contrasting color.
>
> However, the analysis whether a danger is open and obvious does not revolve around whether steps could have been taken to make the danger more open or more obvious. Rather, the question involved is whether the danger, as presented, is open and obvious. The question is: Would an average user with ordinary intelligence had been able to discover the danger and the risk presented upon casual inspection? That is, is it reasonable to expect that the invitee would discover the danger. With respect to an inclined handicap access ramp, we conclude that it is. *Novotney,* 198 Mich. App. at 474-475, 499 NW2d at 381.

Likewise, in *Milliken*, 234 Mich App 490; 595 NW2d 152 (1999), the plaintiff tripped over a support wire behind her mobile home that stretched from the base of the mobile home to a

nearby utility pole. The plaintiff testified that she would have seen the wire had she been paying attention to her surroundings instead of washing the windows of her mobile home. The Michigan Court of Appeals held that the trial court did not err in applying the open and obvious danger doctrine to the case. 234 Mich App at 497-498, 595 NW2d at 156. Further, the Court rejected the plaintiff's argument that the wire remained unreasonably dangerous despite its open and obvious nature:

> . . . [P]laintiff has come forward with no evidence upon which a rational factfinder could conclude that, notwithstanding the open and obvious nature of the support wire, it still presented an unreasonable risk of harm. Instead . . . "[t]he plaintiff's only asserted basis for finding that the [support wire] was dangerous was that she did not see it." Because plaintiff has "failed to establish anything unusual" about the wire and "not presented any facts that the [support wire] posed an *unreasonable* risk of harm," notwithstanding its open and obvious nature, the trial court properly granted summary disposition. *Milliken*, 234 Mich. App. at 499, 595 NW2d at 157 (citations omitted).

In this case, an average patron with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. The photographs of the scene of Appellant's accident support the open and obvious nature of the site. Witnesses had no difficulty identifying the objects in the photographs as pipes. The photographs show that the copper pipes were in plain view. The testimony of Brian Muir establishes that the pipes were even visible from a distance, from the second floor of the IMAX construction site. Appellant acknowledged that there was nothing about the pipes that he could not have seen and noticed had he been looking.

Further, Appellant admitted that his vast experience on construction sites had trained him to remain vigilant for potential trip hazards, such as pipes on the floor. He was accustomed to expect such hazards. He admitted he had "probably" seen the pipes in the area previously. In this instance, however, Appellant was not looking where he was walking and, unfortunately, came upon the pipes and injured himself. Like the plaintiff in *Milliken*, Appellant admitted that the he could have avoided the pipes had he been looking where he was going, thus foreclosing his

ability to argue that the pipes remained dangerous despite their open and obvious nature. Accordingly, because the pipes were a known, or open and obvious dangerous condition, the Michigan Court of Appeals correctly determined that Hoyt did not have a duty to protect Appellant from them.

3. Contrary To Appellant's Suggestion, There Was No Extraordinary Danger In This Case

Notwithstanding the easily discernable nature of the large pipes shown plainly in the photographs, Appellant argues that the condition presented an extraordinary hazard that precluded operation of the open and obvious danger doctrine to the present case. Relying upon an unsworn letter by Robert G. Pachella, Ph.D., a purported expert on "human factors" expert that Appellant failed to identify as an witness in the proper manner, Appellant submits that these pipes presented a dangerous condition despite their obvious condition. (*See* Ex. 3 to Pl's Supplemental Brief Opposing Summary Disposition Motions). Once again, Appellant's argument is misplaced.

The trial court should not have considered Dr. Pachella's affidavit. Appellant failed to identify Dr. Pachella on his witness list or reveal the substance of his testimony in a timely manner. Consequently, the trial court should have struck the affidavit from the record as Defendants requested at the hearing. *See* MCR 2.313(B); *LaCourse v Gupta*, 181 Mich App 293; 448 NW2d 827 (1989) (court may strike item from brief if not properly filed); *Bellock v. Koths*, 163 Mich App 780; 415 NW2d 18 (1987). The trial court, however, considered the Affidavit, but was not swayed by Appellant's arguments. (*See* Tr. 11/11/01 at 69-72; Hoyt's Appx. 373b-376b).

Moreover, although entitled "Affidavit", the letter was not verified by oath or affirmation and therefore did not meet the procedural requirements of MCR 2.113(A). A valid affidavit must be (1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3)

confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. *Holmes v. Michigan Capital Medical Center*, 242 Mich. App. 703, 711-712; 620 N.W.2d 319, 323-24 (2000); Black's Law Dictionary (7th ed.). Affidavits that do not meet these requirements do not satisfy the requirements of MCR 2.116(C)(10) to create a question of fact. *See SSC Associates Ltd Partnership v General Retirement System of Detroit,* 192 Mich App 360, 363; 480 NW2d 275, 277 (1991); *Harvey v. Medola*, 2002 WL 481803, fn 1 (Mich Ct App., March 22, 2002). *See also* MCR 2.119(B)(1)(c); *People v. Burns,* 161 Mich. 169, 173; 125 NW 763 (1910).

Even if properly considered, the letter does not change the correct result in this case. The gist of Dr. Pachella's opinion testimony is that people are physiologically incapable of seeing things on the ground in front of themselves when they walk. Not only does this theory contradict universal human experience and common sense, it runs counter to Michigan law, which presumes the ability to see and navigate around objects within one's path. *Milliken*, *supra*, is but one example of the application of this presumption. Appellant's own testimony that he "saw things laying on the ground" around him before he fell demonstrates the fallacy of Dr. Pachella's affidavit.

The assumption underlying Dr. Pachella's opinion, *i.e.*, that "it is our normal expectation that our environments are designed and maintained so that we can be visually, or otherwise, distracted by other stimulation or tasks without risk of injury as we walk," plainly has no application to the facts of this case. Appellant was allegedly injured at a construction site, not at a shopping center or in another controlled environment. Under the law, Appellant, who was as an experienced electrician working to erect a new structure, "which in its progress undergoes frequent changes and involves extra risks," is presumed to have knowledge of and to have assumed the extra risks inherent in his job. *Porth v Cadillac Motor Car Co*, 198 Mich 510, 512;

165 NW 698, 702 (1917). Appellant himself repeatedly testified that he knew of the dangers that existed at the IMAX site and was acutely aware of the need to remain vigilant to them. Simply put, Appellant was not permitted to wander blindly through the construction site. Distraction is not a counter-defense to the open and obvious doctrine.

With respect to the Affidavit of Chris Mamp, the trial court properly excluded his proposed testimony regarding what Appellant saw when he entered the storage room. One employee (Mr. Mamp) cannot speculate and conjecture how another employee (Appellant) in fact did see the condition. Mr. Mamp's Affidavit is unreliable and improper. (Tr: 11/11/01 at 44-46; Hoyt's Appx. 348b-350b).

Finally, Appellant cites *Pippin v Attallah*, 245 Mich App 136; 626 NW2d 911 (2001), apparently for the proposition that this Court must give dispositive weight to Dr. Pachella's affidavit. In *Pippin*, Dr. Pachella's testimony was but one piece of evidence in a body of evidence that overwhelmingly suggested the hazard in that case was not open and obvious. *Id.* at 143-144, 626 NW2d at 914-15. Other evidence included eyewitness testimony that the hazard in *Pippin*, a chain stretched across a parking lot, was not visible "'straight on'" when viewed under the reflection of the sun. *Id.* at 144, 626 NW2d at 914-15. Conversely, every witness in this case, including Appellant, testified that the copper pipes were plainly visible. The difference is obvious.

D. HOYT, AS ANOTHER SUBCONTRACTOR AT THE SITE, OWED NO DUTY TO APPELLANT

1. Standard of Review

A trial court's decision to grant or deny a motion for summary disposition is reviewed *de novo* by this court. *Spiek v. Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201, 204 (1998).

2. Subcontractors Have No Duty To Protect Employees of Other Subcontractors

Hoyt owed no duty in this case to protect employees of other subcontractors. *See Klovski v Martin Fireproofing Corp*, 363 Mich 1, 5-6; 108 NW2d 887, 890 (1961). In *Klovski*, the plaintiff was injured when he slipped on a roofing project site. He brought suit against the general contractor and other subcontractor on the site. The trial court granted a directed verdict in favor of the other roofing subcontractor. This Court affirmed and explained that a subcontractor working on a project has no general duty to protect the employees of other subcontractors. In addition, the Court explained that even if it did, the duty did not extend to open and obvious conditions:

> Appellant urges also that defendant breached 'one or both of its duties to plaintiff, that is, (1) its duty to make the premises safe, or (2) its duty to warn of a known dangerous condition.' The plaintiff's difficulty is, again, with the facts. There was no duty upon defendant Martin, one of the roofing subcontractors, to make the premises safe for all who might work there, if, indeed, this were possible of accomplishment in a building under construction. Plaintiff, in fact, was not injured while on defendant Martin's work, using its equipment (there was no defect in the ladder), nor was he injured in an area turned over to his own employer for the performance of its operations but left in an unsafe condition through Martin's negligence. The danger, moreover, in working upon the roof of premises under construction is obvious to all who will look. As we observed in an earlier case, the doctrine of the safe place cannot be applied as controlling where the facts before the court disclose construction work which, by its very nature, involves unusual risks in a progressively changing situation. We find no error in the case. *Klovski,* 363 Mich. at 5-6, 108 NW2d at 890.

This case presents the same situation as *Klovski.* Like that case, Appellant was an employee of one subcontractor, allegedly injured on another's work material. Like *Klovski*, the condition of the work material was open and obvious. Accordingly, the lower courts correctly found that Appellee Hoyt had no duty to protect or warn Appellant. The Court of Appeals noted that Appellant sued Hoyt only for general negligence principles, not specific contractor liability. *Ghaffari*, 259 Mich App at 612-14, 676 NW2d at 262-64. A subcontractor simply has no duty to make sure that premises are safe for the employees of other subcontractors, particularly when

Appellant has failed to demonstrate that the pipes belonged to Hoyt or that Hoyt knew that Appellant would walk in that area without looking down. *See Suliman v. Pontiac Ceiling and Partition Co.*, 2004 WL 1672454 (Mich Ct App, July 27, 2004) (a co-subcontractor owed no duty to plaintiff, who worked for another subcontractor). At most, Hoyt owed Appellant a general duty of care that was obviated by the open and obvious defense. This Court should AFFIRM the opinion of the Court of Appeals with respect to Hoyt.

E. THE *FULTZ* CASE DOES NOT IMPOSE AN ADDITIONAL DUTY ON HOYT

Appellant also argues that Defendants owed Appellant a duty to complete their work in a non-negligent manner based on this Court's decision in *Fultz v. Union-Commerce Associates*, 470 Mich 460; 683 NW2d 587 (2004). (*See* Appellant's Brief on Appeal at 34-35). Appellant has alleged this "contractual" duty for the first time in this Court.

However, Appellant, to Hoyt's knowledge, has not provided a copy of any contract between Hoyt and Turner (or Hoyt and any party) that would give rise to any contractual or other duty. Further, the Court of Appeals noted that Appellant sued Hoyt (and Guideline) for common law negligence and did not properly appeal the issues relating to those parties. *See Ghaffari*, 259 Mich App at 614 n 2; 676 NW2d at 263 n 2 ("The trial court granted each defendant's motion for summary disposition because the danger was open and obvious. For whatever reason, plaintiff's question presented only challenges the dismissal of Turner.").

Even assuming Appellant's arguments to be true, Appellant does not identify any specific language from the contract, but instead states that Hoyt owed a "common-law" duty to Appellant to perform its contract and store its pipes non-negligently. (*See* Plaintiff/Appellant's Brief on Appeal, p. 34-35). ***Appellant's argument fails because Appellant cannot show that the pipes belonged to Hoyt or that Hoyt breached any alleged duty.*** *See infra.* Further, as argued above, the open and obvious doctrine bars any alleged claim for common-law or "ordinary" negligence

in this case. *See Ghaffari*, 259 Mich App at 614; 676 NW2d at 263-64 ("We note that plaintiff's allegations against defendants were not based on premises liability, but were instead based on . . . ordinary negligence principles (in regard to Hoyt and Guideline)."). Consequently, the lower courts properly dismissed Hoyt from this case.

F. THE LACK OF FACTS CONCERNING HOYT'S OWNERSHIP SUPPORT DISMISSAL

1. Standard of Review

A trial court's decision to grant or deny a motion for summary disposition is reviewed *de novo* by this court. *Spiek v. Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201, 204 (1998).

2. Appellant Has Failed To Establish That Hoyt Owed Him Any Duty Because There Is No Evidence To Create A Triable Issue Of Fact That Hoyt Owned The Pipes Upon Which Appellant Allegedly Slipped And Fell.

A plaintiff may not use speculation and conjecture to support a claim of negligence in Michigan. *See Kaminski v. Grand Trunk WR Co.*, 347 Mich 417, 422; 79 NW2d 899, 901-02 (1956) ("There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjecture only."); *Genesee Merchants Bank & Trust Co., v Payne*, 6 Mich App 204, 209; 148 NW2d 503, 506 (1967) ("Fact finders, be they jury or court, may not indulge in conjecture."). Following that rule, Michigan courts traditionally have refused to allow speculation and conjecture to create a genuine issue of material fact. *See Skinner v. Square D Co,* 445 Mich 153; 516 NW2d 475 (1994).

Appellant's alleged proof that Hoyt was connected to the pipes at issue is speculative. David Kunath, a pipe fitter who worked for Hoyt, testified that the pipes did not belong to Hoyt. Rather, the pipes were consistent with those used by Guideline. (*See* Ex. 5 to Hoyt's Motion for Summ. Disp., Dep. of Kunuth at 22-25, 31-32, 54-59; Hoyt's Appx. 274b-277b; 278b-279b;

282b-287b). Other testimony established that these pipes belonged to Guideline, which kept its pipes organized on a mobile scaffold. For example, Mike Wanserski, an Acoustical Ceiling & Partition employee who worked at the IMAX construction site, testified that the copper pipes shown in the photographs belonged to Guideline, not Hoyt. (*See* Ex. 6 to Hoyt's Motion for Summ. Disp., Dep. of Mike Wanserski at 14-15; Hoyt's Appx. 289b). Other witnesses testified that the copper pipes upon which Appellant carelessly slipped and fell could have belonged to any subcontractor at the site that used copper pipes.

At most, the evidence might show an equal possibility that either Guideline or Hoyt owned the copper pipes, as both entities used this kind of pipe at the IMAX theater project. The negligence determination then hinges on mere guesswork to determine the true owner of the copper pipes. Appellant submitted nothing more than mere speculation on this issue and summary disposition was appropriate because Appellant cannot establish either a breach of any alleged duty or causation. Based on the complete lack of proof that Hoyt owned the pipes, this Court should AFFIRM the decision of the Michigan Court of Appeals.

G. THE TRIAL COURT PROPERLY AWARDED ATTORNEYS' FEES

Lastly, Appellant appeals the trial court's award of costs and attorneys' fees (case evaluation sanctions) as to Appellees Turner and Hoyt. Notably, Appellant does not contest the *amount* of the fees paid to Hoyt, but challenges only the award itself. (*See* Pl's Brief on Appeal at p. 43-45).

Following the grant of summary disposition of Appellant's claims, Appellees Turner and Hoyt filed motions for case evaluation sanctions. The motions were based upon MCR 2.403(O)(2)(C). Appellant then challenged the amount of case evaluation sanctions requested by Turner and Hoyt. At a hearing on May 3, 2002, in the Wayne County Circuit Court, Judge

Wendy M. Baxter awarded case evaluation sanctions to Defendant Hoyt in the amount of $10,721.76. (*See* Tr. 5/3/02 at 17; Hoyt Appx. 430b). The Court of Appeals affirmed.

1. Standard Of Review

Under Michigan law, an appellate court reviews a trial court's award of case evaluation sanctions for an abuse of discretion. *See Model Laundries & Dry Cleaners v Amoco Corp.,* 216 Mich App 1, 3-4; 548 NW2d 242, 243-44 (1996), citing *Butzer v Camelot Hall Convalescent Centre, Inc., (After Remand),* 201 Mich.App. 275, 278; 505 N.W.2d 862 (1993); *Stackhouse v. Stackhouse,* 193 Mich.App. 437, 445; 484 N.W.2d 723 (1992). The trial court has the discretion to decide whether a party is entitled to case evaluation sanctions and then determine the amount of those sanctions, if any. *See Put v FKI Industries, Inc.,* 222 Mich App 565; 564 NW2d 184 (1997).

A reviewing court will uphold an award of attorney fees under the rule governing case evaluation sanctions absent an abuse of discretion; a trial court's decision constitutes an abuse of discretion only if that decision was grossly violative of fact and logic. *See Michigan Basic Property Insurance Association v Hackert Furniture Distributing Company, Inc.,* 194 Mich App 230, 234; 486 NW2d 68, 70 (1992), citing *Jernigan v General Motors Corp.,* 180 Mich App 575, 587; 447 NW2d 822 (1989); *see also Spalding v Spalding,* 355 Mich 382, 384-85; 94 NW2d 810, 811-12 (1959). Furthermore, an abuse of discretion exists only when the result so violates fact and logic that it constitutes perversity of will, defiance of judgment, or the exercise of passion or bias. *See Model Laundries & Dry Cleaners,* 216 Mich App at 4, 548 NW2d at 243-44 (citation omitted).

Appellant's earlier assertions that this Court may review the trial court's decision *de novo* is not an accurate statement of the law in Michigan. Appellant previously relied on *McAuley v General Motors Corp.,* 457 Mich 513; 578 NW2d 282 (1998). In *McAuley*, the Court of Appeals

held that the Michigan Supreme Court did not intend for parties to recover two sets of attorney fees, one pursuant to statute and one pursuant to mediation sanctions. *McAuley,* 417 Mich at 515, 578 NW2d at 283-84. The statement in *McAuley* that Appellant relies upon is a general provision, meant to apply when the courts have not announced a more specific rule. Regarding attorney fees awarded pursuant to MCR 2.403(O), case law specifically directs that an courts review an award of attorney fees under an abuse of discretion standard. *See RVP Development Corp. v. Furness Golf Const. Co., Inc.,* 2004 WL 1737589 n 8 (Mich Ct App, Aug. 3, 2004) (discussing and limiting the *McAuley* case to cases in which a party may recover attorneys' fees pursuant to two different rules and/or statutes).

2. Case Evaluation Sanctions Are Properly Awarded When A Verdict Is Entered Pursuant To A Summary Disposition Motion

Appellant argues on appeal that the trial court's award of case evaluation (formerly mediation) sanctions was improper. Despite the clear wording of MCR 2.403, Appellant incorrectly argues that the trial court should not have awarded costs because the trial court granted summary disposition after case evaluation.

The Michigan Court Rule pertaining to case evaluation sanctions is contained in MCR 2.403(O). The applicable provision states:

> (O) Rejecting Party's Liability for Costs.
>
> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

The court rule then defines costs to include any taxable costs and a "reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of case evaluation." MCR 2.403(O)(6).

Under this court rule, the imposition of case evaluation sanctions occurs when a rejecting party (in this case, Appellant) fails to recover a more favorable verdict. The purpose of MCR 2.403 is to simplify final settlement of cases to avoid trial. The sanction places the burden of the litigation costs on the party who demands trial by rejecting the case evaluation award. *See Bennett v Weitz,* 220 Mich App 295, 301; 559 NW2d 354, 357 (1996). The Michigan Court of Appeals has held that where both parties reject the case evaluation award and the matter proceeds to trial, a party is entitled to actual costs if the verdict is more favorable to that party than the case evaluation award. *See Patterson v Cataline,* 189 Mich App 222, 223; 472 NW2d 65, 66 (1991). Actual costs include attorney fees based upon a reasonable hourly rate for services necessitated by the case evaluation rejection; the rate actually charged by the attorneys is not determinative. *See Attard v Citizens Ins. Co. of America,* 237 Mich App 311, 328; 602 NW2d 633, 642 (1999); *Cleary v. The Turning Point*, 203 Mich App 208, 211-12; 512 NW2d 9 (1993).

Prior versions of MCR 2.403(O) prompted confusion by failing to define the term "verdict." Before December 1, 1987, the court rule governing the award of case evaluation (mediation) sanctions provided that such sanctions were available when a party rejected the award and the action proceeded to trial. *See Parkhurst Homes, Inc. v McLaughlin,* 187 Mich App 357, 363; 466 NW2d 404, 407 (1991). When courts were required to apply this language, confusion resulted when parties requested case evaluation sanctions following the granting of motions for summary disposition. *See Parkhurst,* 187 Mich App at 363, 466 NW2d at 407. Under the current law, "verdict" has been defined. MCR 2.403(O)(2) states:

> (2) For the purpose of this rule "verdict" includes,
>
> > (a) a jury verdict,
> > (b) a judgment by the court after a nonjury trial,
> > (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

Under MCR 2.403, it is apparent that the court rule contemplates and authorizes an award of case evaluation (mediation) sanctions when a judgment is entered following a motion for summary disposition. Moreover, *the rule specifically permits an award of case evaluation sanctions when a trial court grants summary disposition following a rejection of the case evaluation.*

Michigan courts have upheld case evaluation sanctions in this context. The Michigan Court of Appeals held that it makes no difference whether summary disposition is filed before or after case evaluation. *See Meagher v McNeely & Lincoln, Inc.,* 212 Mich App 154; 536 NW2d 851 (1998) (holding that the trial court properly awarded mediation sanctions to defendant despite the fact that defendant filed its motion for summary disposition prior to case evaluation); *see also Nowack v Botsford General Hospital,* 2001 WL 682480 (Mich Ct App, April 20, 2001) (implicitly recognizing the propriety of filing a motion for summary disposition subsequent to case evaluation); *see, e.g. Pilarski v Detroit Elevator Co.*, 1998 WL 1989993 (Mich Ct App, Sept. 4, 1998) (impliedly recognizing that an award of case evaluation sanctions may be based upon a grant of summary disposition after case evaluation). MCR 2.403(O) explicitly authorizes the award of case evaluation sanctions in circumstances identical to those presented in the instant matter. Appellant's argument contradicts the wording of MCR 2.403(O), interpretive cases, and established practice and custom.

Appellant's argument that Appellee Hoyt somehow acted improperly in *filing* its motion for summary disposition after case evaluation is equally perplexing. There are numerous reasons for waiting until after case evaluation to file a motion for summary disposition. Case evaluation presents counsel for all parties with a more advanced understanding of the strengths and weaknesses of a particular action. The process of case evaluation could convince a party that a motion for summary disposition is a valuable tool to expedite resolution of a particular action. Hoyt chose to file its motion for summary disposition following the case evaluation for tactical

reasons. Appellant has cited no legal authority purporting to hold that waiting until after case evaluation to file a motion for summary disposition is improper. Indeed, Appellant's reliance on Longhofer's *Handbook on Civil Procedure* simply notes a comment of the Report of the Mediation Rules Committee. Nothing in the *court rule* provides a limitation on when a court may impose case evaluation sanctions.

Here, Appellant rejected the case evaluation award and the trial court then granted summary disposition to Appellees. Appellant failed to recover a "favorable" verdict and Appellee Hoyt was entitled to actual costs. The trial court's interpretation of MCR 2.403 and its subsequent award of case evaluation sanctions were based upon established Michigan law and did not constitute an abuse of discretion. The appellate court rightly agreed.

3. The Interests of Justice Do Not Require That This Court Reverse The Award of Actual Costs To Hoyt.

Appellant argues that the award of case evaluation sanctions to Turner and Hoyt should be reversed pursuant to the "interests of justice." Appellant relies upon MCR 2.403(O)(11), but cites no case law in support of his argument. Further, Appellant argues that case evaluation sanctions were inappropriate because Appellant's counsel was on a European holiday when this Court issued its opinion in *Lugo*. Hoyt cannot be held responsible because Appellant's counsel took a vacation.

Michigan cases give have yet to fully define the phrase "interests of justice" within the meaning of MCR 2.403(O)(11). Michigan case law, however, does give guidance regarding the meaning of "the interests of justice" regarding a similar court rule. These cases may be used as an analogy for the issue here. MCR 2.405, which is very similar to MCR 2.403, also defines the term "verdict":

(4) "Verdict" includes,

(a) a jury verdict,

(b) a judgment by the court after a nonjury trial,
(c) a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment.

MCR 2.405 provides for the imposition of costs, including attorneys' fees, as the result of rejection of an offer and contains a section regarding actual costs incurred. The relevant portions of the court rule state:

> **(D) Imposition of Costs Following Rejection of Offer.** If an offer is rejected, costs are payable as follows:
>
> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
> (2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs unless the offer was made less than 42 days before trial.
> (3) The court shall determine the actual costs incurred. **The court may, in the interests of justice, refuse to award an attorney fee under this rule.**

The phrase "interests of justice" remained undefined until 1996. In *Luidens v 63rd Dist. Ct.,* 219 Mich App 24; 555 NW2d 709 (1996), the court defined "interests of justice" as an exception to the general rule that actual costs must be paid if certain conditions exist. *See Luidens,* 219 Mich App at 37, 555 NW2d at 715. The Court urged that caution be used when applying the interests of justice exception, citing the provision's "exceptional nature." *Id.* at 32, 555 NW2d at 713. The Court further stated that the exception should only be applied in "unusual circumstances." *Id. See Stitt v Holland Abundant Life Fellowship,* 243 Mich App 461, 472; 624 NW2d 427, 432-33 (2001) (commenting on the *Luidens* decision).

The Michigan Court of Appeals has held that an example of a proper situation for application of the interests of justice exception occurs when the case involves a legal issue of first impression. *See Henry v Jackson,* 1999 WL 33444336 at 5 (Mich Ct App, May 14, 1999). Courts must articulate a "compelling rationale" when applying the interest of justice exception.

See Henry v Jackson, 1999 WL 33444336 (Mich Ct App, May 14, 1999), citing *Hamilton v Becker Orthopedic Appliance Co.,* 214 Mich App 593, 596; 543 NW2d 60 (1995). The Michigan Court of Appeals held that a reasonable refusal of an offer is insufficient to justify failure to award costs under MCR 2.405. *See Henry v Jackson,* 1999 WL 33444336 (Mich Ct App, May 14, 1999), citing *Butzer v Camelot Hall Convalescent Center, Inc., (after remand)* 201 Mich App 275, 278; 505 NW2d 862 (1993); and *Gudewicz v Matt's Catering, Inc.*, 188 Mich App 639, 645; 470 NW2d 654, 657 (1991).

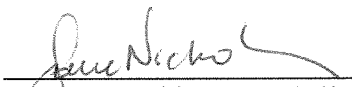
Overall, Michigan law contains no policy against awarding case evaluation sanctions to a party that waits until after case evaluation to file its motion for summary disposition. The cases cited above demonstrate that the exception should only be applied in the rarest of circumstances so that the exception not consume the general rule favoring the award of case evaluation sanctions in accord with the court rules. The law regarding the open and obvious doctrine was not unsettled at the time of the case evaluation hearing. Although *Lugo* was released after case evaluation, it did not radically reshape the open and obvious landscape, but merely revisited already-established concepts. The timing of the release of *Lugo* does not provide this court with a basis to reverse the award of case evaluation sanctions.

Regarding Appellant counsel's holiday, Hoyt submits that Appellant should not be rewarded for taking a European vacation at a critical time in this matter. Had Appellant's counsel not taken the vacation, he would have been able to both address *Lugo, supra,* in his responsive pleadings and review the case before deciding whether to accept or reject the case evaluation award. Counsel's time spent on vacation does not provide sufficient grounds upon which to assert the "interests of justice" exception to MCR 2.403(O). When considering the surrounding circumstances in the light of existing law, it is apparent that the trial court did not abuse its discretion in awarding case evaluation sanctions to Hoyt and Turner. The Michigan Court of Appeals correctly affirmed.

IV. CONCLUSION

For the reasons above stated, Defendant-Appellee, Hoyt, Brum & Link, Inc. respectfully requests this Court AFFIRM the decision of the trial court and the Michigan Court of Appeals with respect to Appellee Hoyt.

HARVEY KRUSE, P.C.



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